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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 869

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Petitioner,

vs.

DIXON, IRMAOS & CIA. LTDA.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Statement	2
Questions Presented	3
Specifications of Errors to Be Urged	3
Reasons for Granting the Writ	4
1. The Decision of the Circuit Court of Appeals Is in Conflict With a Controlling Decision of the New York Court of Appeals	5
2. The Decision of the Circuit Court of Appeals Was Capricious, in That It Refused to Consider the Limitations Imposed Upon the Custom by the Testimony of the Same Banking Experts Whose Testimony Was Relied Upon to Establish the Custom	8
3. The Decision of the Circuit Court of Appeals Is Important	10

Citations.

	PAGE
American Sugar Co. v. *Nicholas,* 124 F. (2d) 477, 479 (C. C. A. 10th, 1941)	6
DeWitt v. *Berry,* 134 U. S. 306 (1890)	7
Erie R. R. v. *Tompkins,* 304 U. S. 64 (1938)	3, 5, 7, 10
Gravenhorst v. *Zimmerman,* 236 N. Y. 22 (1923)	8
Green v. *Wachs,* 254 N. Y. 437 (1930)	8
Hearne v. *Marine Ins. Co.,* 20 Wall. 488, 492 (1874)	7
Hopper v. *Sage,* 112 N. Y. 530 (1889)	8
Huddleston v. *Dwyer,* 322 U. S. 232 (1944)	7
Insurance Co. v. *Wright,* 1 Wall. 456, 470 (1863)	8
Kerber Straw Hat Corp. v. *Lincoln,* 239 App. Div. 727 (1st Dept., 1934), aff'd w.o., 266 N. Y. 410 (1934)	8
Lese v. *Lamprecht,* 196 N. Y. 32, 36 (1909)	6
Mitchill v. *Lath,* 247 N. Y. 377, 379 (1928)	6
National Bank v. *Burkhardt,* 100 U. S. 686, 692 (1879)	7
Pink v. *American Surety Co.,* 283 N. Y. 290 (1940)	8
Pitcairn v. *Hiss Co.,* 124 Fed. 110, 113 (C. C. A. 3rd, 1903)	7
Silberman v. *Clark,* 96 N. Y. 522 (1884)	6, 7
Transatlantic Shipping Co. v. *St. Paul Fire & Marine Ins. Co.,* 9 F. (2d) 720 (C. C. A. 2nd, 1925)	8
Zell v. *American Seating Co.,* 138 F. (2d) 641 (C. C. A. 2nd, 1943), 321 U. S. 757, rev'd 322 U. S. 709 (1944)	4, 5, 7, 10

Authority Cited.

29 Cornell Law Quar. 543 (1944)	7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The above-named petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, filed October 30, 1944 (R. 310), reversing the judgment of the United States District Court for the Southern District of New York filed July 28, 1943 (R. 285).

Opinions Below.

The opinion of the United States District Judge (R. 279) and the opinion of the Circuit Court of Appeals (R. 286) reversing the judgment below are not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered October 30, 1944 (R. 310). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925.

Statement.

The decision of the Court of Appeals reversed the judgment of the District Court, dismissing the complaint on the merits, and held petitioner bound to pay two drafts presented by respondent against letters of credit issued by petitioner in favor of respondent.

Said letters of credit stipulated payment of drafts presented thereunder only when accompanied by "full set of bills of lading". Nevertheless, respondent presented to petitioner for payment the two drafts in question, each accompanied by only one-half set of the bills of lading, and offered in lieu of the missing parts the guaranties (R. 226, 232) of the Guaranty Trust Company of New York to hold petitioner harmless from consequences arising from this "discrepancy".

Petitioner refused (R. 227, 233) to accept the guaranty against loss in lieu of compliance with the stated condition of its letters of credit and refused payment of the drafts for three reasons, one of which, namely, that only one half of the bills of lading was presented, is the subject of this petition.

Evidence of a custom among New York banks to accept guaranties of this character in lieu of a missing part of a bill of lading was admitted at the trial over petitioner's objection (R. 51-54). The trial court found that the custom existed but also that "the bank issuing the credit was, how-

ever, free to exercise its own discretion and make its own determination as to whether it would accept a guaranty in lieu of a missing bill of lading" (R. 276). The Court of Appeals, in its opinion, supporting the reversal, overruled petitioner's contention that evidence of such a custom was inadmissible to vary the unambiguous terms of the letters of credit and held that petitioner was bound by said custom.

The petitioner filed a petition for rehearing (R. 294), which was denied by the Court of Appeals (R. 309).

Questions Presented.

1. Is the rule of *Erie R. R.* v. *Tompkins,* 304 U. S. 64 (1938), to be followed in all questions of substantive law without exception?

2. May a Federal Court in the State of New York disregard a rule, established by the decisions of the New York Court of Appeals, by accepting evidence of a custom, which overrides the provisions of a written contract?

3. Are banks compelled to accept guaranties against loss for paying drafts not complying with the express provisions of their letters of credit, merely because they have not refused such guaranties in the past, although it was the understanding among banks that they had the right to refuse such guaranties?

Specifications of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding, contrary to the decisions of this Court and the decisions of the Courts of the State of New York,

that evidence of a custom may be accepted to vary the clear terms of a letter of credit.

2. In holding, contrary to a controlling decision of the New York Court of Appeals, that the meaning of the term "full set of bills of lading", which has been clearly established by testimony, may then be modified or contradicted by evidence of a custom.

3. In disregarding the uncontradicted testimony of banking expert to the effect that New York banks, in their discretion, may refuse guaranties against loss for paying drafts, presented without full compliance with the provisions of the letters of credit, against which they are drawn.

Reasons for Granting the Writ.

The principal reason for granting the writ is that the decision of the Circuit Court of Appeals arbitrarily disregards not only the decisions of this Court and its own decisions but also a decision of the New York Court of Appeals, which is an exact and controlling precedent.

That Court, obviously, has persisted, in this case, in giving effect to its disapproval of the parol evidence rule, expressed in the opinion written in support of its reversal of the District Court in *Zell* v. *American Seating Co.*, 138 F. (2d) 641 (C. C. A. 2nd, 1943). There the Court of Appeals, in holding that the lower court erred in enforcing the State parol evidence rule, argued at length that the usefulness of the rule, except in jury trials, is practically non-existent. This Court granted certiorari in the *Zell* case (321 U. S. 757) and reversed (322 U. S. 709 (1944)), four of the seven judges, who voted for reversal, basing their decision on the failure of the lower appellate court to apply the applicable State parol evidence rule. In the

case at bar, the Court of Appeals, although it paid lip service to the parol evidence rule, repudiated it, we submit, as thoroughly as it repudiated it in the *Zell* case.

This Court should decide the question, hitherto not clearly decided, whether or not a district federal court is bound, under the rule in *Erie R. R.* v. *Tompkins,* 304 U. S. 64 (1938), to follow the state court on questions involving the application of the parol evidence rule.

The decision of the Court of Appeals herein is important because its destruction of a basic legal bulwark will affect the decision of numerous cases based on documents used daily by banks in transactions involving, in the aggregate, enormous sums of money.

1. The decision of the Circuit Court of Appeals is in conflict with a controlling decision of the New York Court of Appeals.

The Circuit Court of Appeals, in accepting evidence of a custom not only varying but contradicting the express terms of the letters of credit involved, rather casually assigned as a reason for failing to apply the parol evidence rule its opinion that "the custom under consideration explains the meaning of the technical phrase 'full set of bills of lading' and is incorporated by implication into the terms of defendant's letters of credit" (R. 291). Obviously, there was no need for explanation of the term. It is understood by everyone in the business world. The trial judge, trial counsel and witnesses understood it. Respondent's own witness testified (R. 58) that it meant the presentation of the two duplicate originals of the bills of lading. The guaranties, which were offered herein in lieu of the missing bills of lading (Exs. 7, 14; R. 226, 232),

agreed to hold the respondent harmless from all consequences arising from the discrepancy, "only one set presented out of a full set of two bills of lading issued".

Assuming, however, for the purpose of argument, that the term needed explanation, consideration of the evidence of custom here involved was directly contrary to the holding of the New York Court of Appeals in *Silberman* v. *Clark*, 96 N. Y. 522 (1884).

In that case, the question considered was exactly similar to the question presented here. It was sought to prove that, by a custom in the trade, an f.o.b. contract meant that the seller of merchandise should pay for inspection. The New York Court of Appeals said:

> "In this contract, after the letters *f.o.b.* are explained and understood, there is nothing ambiguous. There is no latent ambiguity which needs explanation. All the language has a meaning, and hence there is no room, under the rules of law, for parol evidence. The meaning of the language used cannot be changed or varied by the proof of any custom, and hence there was no error in this case upon the trial in excluding such proof * * *" (p. 524).

Thus, in the case at bar, after evidence showing that "full set of bills of lading" meant all copies thereof, it was directly contrary to said decision of the New York Court of Appeals to allow evidence of a custom to accept a guaranty against loss in lieu of compliance, evidence which did not explain but, on the contrary, destroyed the established meaning of the term.

It is submitted that the application of the parol evidence rule is a question of substantive law (*Lese* v. *Lamprecht*, 196 N. Y. 32, 36 [1909]; *Mitchill* v. *Lath*, 247 N. Y. 377, 379 [1928]; *American Sugar Co.* v. *Nicholas*, 124 F. (2d) 477,

479 [C. C. A. 10th, 1941]; *Zell* v. *American Seating Co.*, 138 F. (2d) 641 [C. C. A. 2d, 1943]; *Pitcairn* v. *Hiss Co.*, 125 Fed. 110, 113 [C. C. A. 3rd, 1903]; 29 Cornell Law Quar. 543 [1944]) and that the decisions of the New York courts upon this question are binding upon Federal Courts sitting in New York (*Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1938); *Huddleston* v. *Dwyer*, 322 U. S. 232 (1944)).

If these propositions are sound, then the decision of the Court of Appeals is grievously wrong in this particular case. But more important is its effect on future cases. The decision, if unreversed, becomes authority for imposing a limitation on the rule of *Erie R. R.* v. *Tompkins* and creates confusion where there was none before. If there is any doubt (*cf. American Seating Co.* v. *Zell*, 322 U. S. 709 [1944]) that a federal district court, under the rule of *Erie R. R.* v. *Tompkins*, must follow the state court in deciding questions relating to the application of the parol evidence rule, then this Court should review this case and settle that doubt.

It should also be definitely decided if the aversion of the Circuit Court of Appeals for the Second Circuit to the parol evidence rule, as disclosed by its opinion in *Zell* v. *American Seating Co., supra*, is to be approved or condemned.

In any event, the ruling in *Silberman* v. *Clark*, to which reference has been made above, only applies the law, followed in many decisions of this Court, the courts of New York and even the Circuit Court of Appeals for the Second Circuit, itself.

DeWitt v. *Berry*, 134 U. S. 306 (1890);

National Bank v. *Burkhardt*, 100 U. S. 686, 692 (1879);

Hearne v. *Marine Ins. Co.*, 20 Wall. 488, 492 (1874);

Insurance Co. v. *Wright,* 1 Wall. 456, 470 (1863);
Pink v. *American Surety Co.,* 283 N. Y. 290 (1940);
Green v. *Wachs,* 254 N. Y. 437 (1930);
Gravenhorst v. *Zimmerman,* 236 N. Y. 22 (1923);
Hopper v. *Sage,* 112 N. Y. 530 (1889);
Kerber Straw Hat Corp. v. *Lincoln,* 239 App. Div. 727 (1st Dept., 1934), aff'd w. o., 266 N. Y. 410 (1934).

It is submitted that the decision of the Court of Appeals herein cannot be reconciled with these cases or with its own prior decision in *Transatlantic Shipping Co.* v. *St. Paul Fire & Marine Ins. Co.,* 9 F. (2d) 720 (C. C. A. 2nd, 1925).

The meaning of the term, "full set of bills of lading", is clear and unambiguous. The decision of the Court of Appeals that the term may be explained by a custom, which does not explain but destroys its well known and commonly accepted meaning, is unreasonable and contrary to all the precedents cited above. This incursion upon the desirable safeguards of the parol evidence rule, it is submitted, is, in itself, sufficient reason for allowing the writ prayed herein.

2. The decision of the Circuit Court of Appeals was capricious, in that it refused to consider the limitations imposed upon the custom by the testimony of the same banking experts whose testimony was relied upon to establish the custom.

The Court of Appeals held the custom was established by the testimony of officers of leading New York banks, who testified that they knew of no instance in which a guaranty,

offered in lieu of a missing part of a bill of lading, had been refused by a New York bank. The Court, however, refused to give effect to the last sentence in Finding 13, made by the District Court, reading:

> "The bank issuing the credit was, however, free to exercise its own discretion and make its own determination as to whether it would accept a guaranty in lieu of a missing bill of lading."

This finding was fully supported by uncontradicted evidence (R. 175-6; 189; 197; 206). In short, the Court gave full effect to the testimony of these banking experts that a custom existed but refused to give any effect to the testimony of the same banking experts that the custom had the limitation described in the excerpt from Finding 13, quoted above.

Furthermore, the Court of Appeals, for no discernible reason, accepted the custom with two limitations but rejected a third, proved by the same type of evidence. It accepted the limitations that a bank, to which a letter of indemnity is offered (1) may reject the same if, in its arbitrary opinion, the offering bank is not of a satisfactory financial standing and (2) may reject the same if unsatisfactory in form. The Court of Appeals rejected the third limitation, testified to by the same witnesses, namely, that the bank issuing the letter of credit was free to make its own determination as to whether or not it would accept a guaranty in lieu of a missing bill of lading.

It is submitted that such an erratic consideration of the evidence constitutes a departure from the accepted and usual course of judicial procedure, which should be reviewed and corrected.

3. The decision of the Circuit Court of Appeals is important.

Finally, a writ of certiorari should issue because the decision below is important in the commercial world. The decision affects or may affect a very large number of letters of credit issued by New York banks,* which, if they recognized the custom involved here, when they issued letters of credit, nevertheless undoubtedly believed that they had the right to determine finally whether or not they would accept a guaranty in lieu of a missing part of a bill of lading just as they have always had the right to make or refuse loans to customers, who have previously borrowed from them many times.

This decision, in its invasion of the parol evidence rule, will also have its effect on cases involving numerous other documents used in the banking business. It is self-evident that the parol evidence rule is a beneficial rule, which defeats dishonest claims and supports the stability of banking transactions and the exactitude with which they should be conducted. It would seem to be undesirable to raise any doubt in the minds of bankers and other business men that exact terms in contracts cannot be relied upon as fixed and inviolate to a claim of modification or repudiation by virtue of an existing custom. It would be an extraordinary innovation to limit the application of the parol evidence rule to jury trials, as suggested in *Zell* v. *American Seating Co.*, 138 F. (2d) 641.

Furthermore, the rule in New York is not a matter of procedure but of substantive law (*supra*, pp. 6, 7). Is the rule of *Erie R. R.* v. *Tompkins* to be applied to all

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* Petitioner alone issues from 18,000 to 34,000 letters of credit per year (R. 149).

matters of substantive law without exception or to all matters of substantive law except the parol evidence rule?

Regardless of whether this Court thinks the Court below should be affirmed or reversed, the questions involved herein, it is submitted, certainly should be definitely answered for the future guidance of the bar.

WHEREFORE, petitioner prays that a writ of certiorari issue to review the judgment of the Court below.

Dated: New York, N. Y., January 24, 1945.

Respectfully submitted,

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